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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. ~~700~~ 56

THE UNITED STATES, PETITIONER,

v.

SWIFT AND COMPANY, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT IN OPPOSITION.

G. CARROLL TODD,
Attorney for Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT IN OPPOSITION.

The Question.

The question which the Government seeks to have reviewed is, Where a taxpayer has overpaid his tax for one year and the overpayment is credited in whole or in part on taxes due for other years, when is the credit *allowed* so as to become effective as a payment?

The question arises in determining when the four-year period within which to file a claim for refund

begins to run, where, as in this case, the tax was paid by the allowance of a credit.

The same question is involved in *United States* v. *Boston Buick Co.* and *United States* v. *Iron Cap Copper Co.*, 35 Fed. (2d) 560, C. C. A. 1st, in which, also, the Government is applying for writs of certiorari, Nos. 632 and 633. There the question arises in determining the date to which to compute interest on credits.

The lower courts all held that the question was settled by this Court in *Girard Trust Co.* v. *United States*, 270 U. S. 163, 70 L. ed. 524.

Statement of the Case.

The respondent obtained a judgment in the Court of Claims for an overpayment of income and excess-profits taxes for 1917 caused by including a stock dividend in its return before it had been decided that such dividends are not income.

The Government admits the overpayment. The point in dispute is whether recovery of it is barred for failure to file a sufficient claim for refund within the period prescribed by law, i. e., within five years from the date when the return was due, Revenue Act of 1921, § 252, or within four years from the time the tax was paid, Revenue Act of 1926, § 284 (b) (1).

Two claims for refund were filed, one February 28, 1923, and another September 3, 1927. (Pet., Exs. A, B, Rec., 8-11.) The Court of Claims, believing that the first did not adequately state the ground of claim, based its judgment on the second, which, concededly, was not open to that objection.

The last payment of 1917 taxes assessed against the respondent was made by allowing an overpayment of 1918 taxes as a credit under § 252 of the Revenue Act of 1921. Therefore, whether the second claim was filed within the four-year period depends upon when this credit was allowed or took effect as a payment.

Under date of February 9, 1923, the Commissioner, in accordance with the established procedure, signed and forwarded to the Collector of Internal Revenue for the First District of Illinois a Schedule of Reductions of Tax Liability (Form 7777), later called Schedule of Overassessments, in which was included an overassessment of income and excess-profits taxes for 1918 against the respondent in the amount of $10,304,753.94, and at the same time forwarded to the Collector undated Certificates of Overassessments addressed to the respective taxpayers named in the schedule and showing the amount of the overassessment against each. On July 25, 1923, the Collector returned this Schedule to the Commissioner with a report entered thereon, and also with a Schedule of Refunds and Credits (Form 7805A), both showing what portions of the overassessments if any were overpayments, and how the overpayments should be distributed as between credits and refunds. With respect to the overassessment of $10,304,753.94 which had been made against the respondent, the Collector's report showed an overpayment of $4,953,575.50 (the balance of the overassessment having been abated); that out of this overpayment certain amounts were "subject to credit" against taxes due for other periods, including an item of $2,813,012.05, the amount of an additional assessment of income and excess-profits taxes for 1917,

which is the credit here in question; and that the balance, $735,028.10, was refundable. At the same time that these schedules were forwarded by the Collector to the Commissioner the Collector returned to the Commissioner the Certificates of Overassessments in the cases of the taxpayers named in the Schedule of Refunds and Credits, including the respondent. Thereafter, under date of September 6, 1923, the Schedule of Refunds and Credits was signed by the Commissioner, the Deputy Commissioner having first signed it; and under date of September 26, 1923, the Certificate of Overassessment addressed to the respondent, showing the amount of the overassessment, and the portion thereof abated, the portion allowed as a credit, and the portion allowed as a refund, was mailed to the respondent and duly received. (Special Findings of Fact, XI, XII, Rec., 14-16.)

The Respective Contentions.

Ignoring the settled distinction between the determination of an overassessment and the allowance of a credit or refund, the Government maintains that a credit is allowed when the Commissioner of Internal Revenue signs and transmits to the proper Collector of Internal Revenue a Schedule of Overassessments—February 9, 1923, in the present case.

The respondent maintains on the other hand that under the law as construed by this Court in *Girard Trust Co.* v. *United States*, 270 U. S. 163, 70 L. ed. 524, neither a credit nor a refund is allowed until the Commissioner, after transmitting the Schedule of Overassessments, receives back the Collector's report showing what part of the over*assessment* listed in the Schedule of Overassessments was an over*payment* and

how much should be credited against taxes for other years and how much refunded, and "makes it effective by his approval"—September 6, 1923, in the present case.

As the Collector keeps the accounts, until his report is received the Commissioner does not even know whether there has been any over*payment* out of which to allow a credit, or, if there has been an overpayment, whether there are any unpaid assessments against which to credit it, so that the Government's contention, if adopted, would put the Commissioner in the impossible position of allowing a credit not only when he does not know what amount to allow, but when the Collector's report in some cases would show no overpayment at all and therefore nothing to credit and in others no unpaid assessments against which to credit any overpayment if there were one.

The Government's contention has been rejected by the lower courts in four cases, not a judge dissenting, as contrary to the decision of this Court in the *Girard Trust Company Case*—by the Court of Claims in the present case, and by the Circuit Court of Appeals, First Circuit, in *United States* v. *Boston Buick Co.* and *United States* v. *Iron Cap Copper Co.*, *ante*, affirming two decisions of the District Court for Massachusetts, one by Brewster, J., 27 Fed. (2d) 395, and one by Morton, J., 31 Fed. (2d) 628.

In no case in which the question was contested has any different view been expressed. While the Government's brief[1] states, "There is some conflict in the decisions of the lower Federal courts" (p. 9), the only

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[1]References herein to the Government's brief are to its brief in Nos. 632 and 633, no separate brief having been filed by it in the present case.

case cited in support of that statement is *Penn Smokeless Coal Co.* v. *United States*, 34 Fed. (2d) 205, in the District Court for Western Pennsylvania. But the point was not in controversy there, the Government's brief in that case stating: "Counsel for the plaintiff and for the Government are agreed that a credit is allowed when the Commissioner approves the Schedule of Overassessments for transmission to the proper accounting officer for credit." (*Penn Smokeless Coal Co.* v. *United States*, U. S. Dist. Ct. W. Dist. Pa. No. 5668 L., Deft's Reply Brief, p. 3a.)

Furthermore, as shown in the opinion of the Court of Claims in the present case (Rec., 19), and that of the Circuit Court of Appeals in the *Boston Buick Company* and *Iron Cap Copper Company Cases*, 35 Fed. (2d) 563, what the Pennsylvania court supposed was "the rule laid down in *Girard Trust Co.* v. *United States*," and upon which it expressly based its conclusion that a credit is allowed when the Schedule of Overassessments is signed, was the text of a Treasury regulation which this Court had quoted only to reject as an erroneous interpretation of the statute!

The respondent maintains further that regardless of whether the claim filed September 3, 1927, was in time, the original claim for refund filed February 28, 1923, admittedly within the prescribed period, was sufficient, or could be made sufficient by amendment as well after the expiration of the period of limitations as before.

The Argument.

Point I.

The credit by means of which respondent made the last payment of 1917 taxes was allowed September 6, 1923, when the Commissioner of Internal Revenue approved the Collector's report showing the amounts of the 1918 overassessment subject to credit and refund, respectively, so that the claim for refund filed September 6, 1923, fell within four years from the date of payment of the tax.

1. THIS COURT DECIDED IN GIRARD TRUST CO. v. UNITED STATES, 270 U. S. 163, THAT A CREDIT IS NOT ALLOWED UNTIL THE COMMISSIONER, AFTER TRANSMITTING TO THE COLLECTOR THE SCHEDULE OF OVERASSESSMENTS, RECEIVES BACK AND APPROVES THE COLLECTOR'S REPORT SHOWING WHAT PART OF THE OVERASSESMENT WAS AN OVERPAYMENT AND IF ANY HOW MUCH SHOULD BE CREDITED AND HOW MUCH REFUNDED.

The *Girard Trust Company Case* involved the meaning of the words "to the date of such allowance" in § 1324 (a) of the Revenue Act of 1921 providing that "upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be * * * paid * * * to the date of such allowance."

The Court first stated the general rule for determining what constitutes an allowance of a claim for credit or refund:

> "The Commissioner of Internal Revenue is the final judge in the administrative branch of

> the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision *finally*, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section." (270 U. S. 170, 70 L. ed. 528.) [Italics ours.]

It then rejected the Government's contention that a credit or refund was allowed under the Revenue Act of 1921 when the Commissioner decided that there had been an overassessment and signed and forwarded to the Collector a Schedule of Overassessments, with instructions to examine his books and report back the amounts, if any, that should be credited or refunded. On this point the opinion states:

> "We cannot concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue, who made the collection and keeps the account with the taxpayer." (270 U. S. 170-171, 70 L. ed. 529.)

If nobody but the Commissioner has authority to allow a claim for credit or refund, and if his decision that there has been an overassessment and his signing of the Schedule of Overassessments and forwarding it to the Collector for a report as to the amounts that should be credited or refunded does not constitute an allowance of the claim, of necessity there can be no allowance until some further act by the Commissioner. The opinion states what that is:

> "The findings and exhibits show that the course of business is that the collector on receiving from the Commissioner the schedule as to the overassessment, examines his books and reports back to the bureau the amount which should be credited on taxes due and the amount to be refunded, that this is examined by the assistant commissioner and then is delivered to the Commissioner, who makes it effective by his approval. Until it reaches him and is approved by him, the refund cannot be paid. This we think is the real date of allowance. Until that time the exact amount of the refund is not fixed finally by competent authority." (270 U. S. 171, 70 L. ed. 529.)

While only refunds were directly involved in the *Girard Trust Company Case*, the Court, as the quoted passages show, expressly put credits on the same footing as refunds for the purpose of determining the date of allowance, and laid down the same rule for both, namely, that the Commissioner "has allowed the claim for the refund *or credit*," not when he "first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue," but only after the collector "examines his books and reports back to the Bureau the amount which should be *credited* on taxes due and the amount to be refunded," and the Commissioner "by his approval" makes that report "effective."

These statements cannot be dismissed as *dicta* because even though the Court had not in express terms put claims for credit on the same footing as claims for refund as regards what constitutes allowance, that would have followed as a necessary consequence from the ground of the decision.

The ground of the decision was that a claim for refund is not allowed until the amount is fixed finally by competent authority, namely, the Commissioner of Internal Revenue:

> "This we think [the Commissioner's approval of the Collector's report] is the real date of allowance. Until that time the exact *amount* of the refund is not fixed finally by competent authority." (270 U. S. 171, 70 L. ed. 529.) [Italics ours.]

As the allowance of a claim for refund and the allowance of a claim for credit are acts of exactly the same nature and effect—*adjudications* by the Commissioner of Internal Revenue against the United States for taxes overpaid (*United States* v. *Kaufman*, 96 U. S. 567, 570-571, 24 L. ed. 792, 793)—if a claim for refund is not allowed until the amount is fixed finally by the Commissioner, the same must be true of a claim for credit.

The reason in both cases is that a claim against the United States for money or money's worth is not finally allowed until the amount has been determined *by the officer or tribunal authorized by law to make the determination*,[1] any more than a judgment of a court

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[1] Compare *Illinois Surety Co.* v. *United States*, 240 U. S. 214, 60 L. ed. 609, construing the words "final settlement" in the Act of August 13, 1894, as amended February 24, 1905 (33 Stat. 811), authorizing subcontractors to bring suit on the contractor's bond "if no suit should be brought by the United States within six months from the completion and final settlement of said contract." The Court said: "The word 'settlement', in connection with the public transactions and

for the recovery of money or money's worth is final until the amount has been determined *by the court*.[1]

The reason operates with even greater force in the case of claims for credit or refund of illegally collected taxes than in the case of ordinary claims, because, as

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accounts, has been used from the beginning to describe administrative determination of the amount due. * * * We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the Government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority." (240 U. S. 219-221, 60 L. ed. 614.)

Compare also *United States v. Clark*, 94 U. S. 73, 75-76, 24 L. ed. 67, 68; 96 U. S. 37, 38, 24 L. ed. 696, 697; *United States v. Louisana*, 123 U. S. 32, 37, 31 L. ed. 69, 72.

[1] Thus, in *Guarantee Co. v. Mechanics Bank & Trust Co.*, 173 U. S. 582, 43 L. ed. 818, the Bank brought suit against the Guarantee Company to recover an amount alleged to be due under two bonds insuring the Bank against loss on account of the fraudulent acts of one of its officers, Schardt, by name. The Guarantee Company denied liability. The lower court adjudged that it *was* liable to the extent of the penalty of each bond, with interest, less the amount of "collections realized on assets or collaterals turned over to the Bank by Schardt to reimburse it," and a Master was appointed to ascertain and report the amount of such collections. It was held this was *not* a final decision, because—"Notwithstanding the company's defenses were adjudged to be bad in law, it remained for the circuit court by proper orders to accomplish the object of the suit, namely, *to ascertain the amount* for which the plaintiff was entitled to judgment and execution." (173 U. S. 586, 43 L. ed. 820.) [Italics ours.]

shown later (*post*, 23-25), the very provision of law which authorizes the Commissioner to allow credits and refunds of illegally collected taxes expressly contemplates that the amount due the taxpayer shall be ascertained before the allowance is made, and because further in such cases the action of the Commissioner "is not the allowance of an ordinary claim against the Government, by an ordinary accounting officer, but the *adjudication* by the first tribunal to which the matter must by law be submitted." (*United States* v. *Kaufman*, 96 U. S. 567, 570-571, 24 L. ed. 792, 793.) [Italics ours.]

The *Girard Trust Company Case* establishes another point with respect to when a credit is allowed. Where, as in that case, part of the overpayment is applicable as a credit against other taxes and part is refundable, the amount of the refund, being simply the balance of the overpayment remaining after the amount of the credit has been determined by the Commissioner,[1] becomes fixed the instant that determination is made.

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[1] Section 252 of the Revenue Act of 1918 provided: "That if, upon examination of any return of income * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installments thereof, then due from the taxpayer under any other return, and any *balance of such excess shall* be immediately refunded to the taxpayer * * *." [Italics ours.] This provision was reenacted without material change in the Revenue Act of 1921, § 252, in the Revenue Act of 1924, § 281, the Revenue Act of 1926, § 284, and the Revenue Act of 1928, § 322.

If, then, the amount of the refund in the *Girard Trust Company Case* was not fixed finally by competent authority until the Commissioner approved the report of the Collector it must have been because until that time the amount of the credit had not been fixed finally by competent authority. Therefore, in deciding when the amount of the refund in that case was fixed finally by competent authority the Court necessarily decided also that the amount of the credit was fixed finally by competent authority at the same time. And the Circuit Court of Appeals in the *Boston Buick Company* and *Iron Cap Copper Company Cases* so held, saying:

> "While it is true that the issue involved in the Girard Trust Company Case related only to the date of the allowance of a refund, the court, though by way of *dictum*, as it may be argued, also as definitely fixed the time of the allowance of credits. Its *dictum* as to the time of allowance of credits was, we think, an inevitable conclusion from its finding as to the time of allowance of a refund; since the amount to be refunded is absolutely determined when the credits are allowed." (35 Fed., 2d, 562.)

Thus, the *Girard Trust Company Case* is not only conclusive of the proposition that a claim for credit, like a claim for refund, is not allowed until the amount is fixed finally by the Commissioner, but also of the proposition that where, as in the present case, part of the overpayment is applicable as a credit and part is refundable the allowance of the credit and the allowance of the refund necessarily take place at the same time because the respective amounts are fixed finally at the same time.

Moreover, the Government presented the case on the theory that there is no difference between a claim for refund and a claim for credit from the standpoint of what constitutes allowance. Thus, contending for the date of the Commissioner's approval of the original schedule as the date of allowance, the Solicitor General's brief stated:

> "The right to refund *or credit* and the amount thereof was thus fixed and determined. * * * Thereafter it was only a routine matter to determine how much the claimant should receive in cash and how much by way of credit. This, of course, takes time if the interests of the Government are to be fully protected. Whichever it may be, the total of principal and interest received by the claimant is the same, and the date of the allowance of the claim, that is, the date of adjudication of his right to *credit* or refund, remains the date of the approval of the original schedule." (Sup. Ct., Oct. Term 1925, No. 137, *Girard Trust Co.* v. *United States*, Brief for United States, pp. 13-14.) [Italics ours.]

And after the case was decided, fixing a later date as the date of allowance, namely, the date of the Commissioner's approval of the Schedule of Refunds and Credits, the Treasury Department at first treated the decision as applicable to claims for refund and claims for credit alike (Govt. Br., 26; T. D. 3850, head-note 1, Cum. Bul. V-1, p. 354, reproduced below [1]), just as it

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[1] "Under Sections 250 (b), 252, and 1324 (a) of the Revenue Act of 1921, the *date of allowance* to which interest is payable on *credits* and refunds is the date of final approval by the Commissioner and not the date

had formerly treated the date on which the Commissioner signed the Schedule of Overassessments as the date of allowance of claims for refund and claims for credit alike.[1]

Again, in *Blair, Comr.* v. *United States ex rel. Birkenstock*, 6 Fed. (2d) 679, affirmed by this Court, 271 U. S. 348, 350, 70 L. ed. 983, 984, on the authority of the *Girard Trust Company Case*, the brief for the Government, replying to a contention by the taxpayer that there might be a difference between credits and refunds as regards the date of allowance, observed:

> "Under the contention of counsel for the petitioners the schedule sent to the Collector is an allowance in the case of a credit, but is not an allowance in the case of a refund. A single word in an Act cannot have one meaning when applied to one set of facts and another meaning when applied to another set of facts; *the word 'allowance' cannot refer to one action of the Commissioner when applied to a credit and to another action when applied to a refund.*" (Ct. App. D. C., Jan. Term 1925, No. 4246, Brief for Appellant p. 23.) [Italics ours.]

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when the Commissioner first determines that an overassessment should be made and transmits the schedule to the collector and not the date of final payment." [Italics ours.]

[1] Thus, Regulations 62, Art. 1040, provided: "A claim for refund *or credit* is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for *credit* or refund." [Italics ours.] Regulations 65, Art. 1371, contained the same provision.

These passages from the Government's briefs in prior cases are quoted not, of course, to show inconsistencies in argument, but to show that it was the understanding of law officers and Treasury officers alike that claims for credit and claims for refund stand on the same footing as regards what constitutes allowance.

The Government now states its position with respect to the bearing of the *Girard Trust Company Case* on when a credit is allowed as follows:

> "In view of these facts, we submit that the *Girard Trust Company case* should not be considered as having decided the question as to when a credit is allowed. We recognize, however, that that case established two principles which are equally applicable to the allowance of a credit, namely: (1) that the allowance of a refund occurs when there is a decision by competent authority that a refund should be made, and (2) that a statute providing for the computation of interest should be construed in the light of the difficulties of government bookkeeping and accounting." (Govt. Br., 19-20.)

The Government thus concedes that the principle laid down in the *Girard Trust Company Case* for determining when a refund is allowed is equally applicable to credits.

This seems to us to concede everything we are contending for, as the principle laid down in the *Girard Trust Company Case* for determining when a refund is allowed is, as just seen (*ante*, 8, 10), that it is when the Commissioner has made his decision *finally*, and that he makes his decision finally, not when he signs and transmits to the Collector the Schedule of Overassessments,

because at that time he does not even know that there has been any overpayment out of which to allow a refund, but when he fixes the amount of the refund by his approval of the Collector's report.

Applying this principle to the allowance of credits, the Commissioner makes his decision *finally*, not when he signs and transmits to the Collector the Schedule of Overassessments, because at that time he does not even know that there has been any overpayment out of which to allow a credit, but when he fixes the amount of the credit by his approval of the Collector's report.

2. THE CONTENTION THAT A CREDIT IS ALLOWED WHEN THE COMMISSIONER SIGNS THE SCHEDULE OF OVERASSESSMENTS.

a. A determination that there has been an overassessment is not an allowance of a credit or refund.

The fundamental error in the Government's position here, as it was in the *Girard Trust Company Case*, is its failure to distinguish between a determination of an overassessment and an allowance of a credit or refund.

The provision of the Schedule of Reductions of Tax Liability (later called Schedule of Overassessments) the signing of which by the Commissioner is alleged to have constituted an allowance of a *credit* in this case is the same provision the signing of which by the Commissioner was alleged to have constituted an allowance of a *refund* in the *Girard Trust Company Case*, and is set forth in the Special Findings of Fact, par. XI, (Rec., 14-15.)

It does not even purport to be an allowance by the Commissioner of either a credit or a refund. It is, as

it says, an allowance of a "reduction of tax liability," a determination of an overassessment.

This distinction goes to the root of the matter. Deciding that there has been an overassessment is only the first step in the allowance of a credit or refund. The opinion in the *Girard Trust Company Case* expressly states that the proceedings leading up to the allowance of a credit as well as of a refund only "began" with that action. (270 U. S. 164-165, 70 L. ed. 526.) Before the Commissioner can allow a credit or refund, it still has to be determined, *first*, what part of the *overassessment*, if any, was paid and what part abated; *second*, what unpaid assessments there are against the taxpayer for other years; and *third*, whether such unpaid assessments, if any, are legally collectible in whole or in part.

At the time of signing and forwarding to the Collector the Schedule of Overassessments the Commissioner did not know, as the text of his authorization to the Collector shows (Special Findings of Fact, XI, Rec., 14-15), whether or not there had been any overpayment out of which to allow a credit or refund, nor, if there had been an overpayment, whether there were any unpaid assessments for other years to be set off, if legally collectible; and he did not get that information until the Collector returned the Schedule of Overassessments together with a report showing the state of the taxpayer's account.

That the Commissioner had to have this information before he could allow a credit was recognized by the Treasury Department itself from the beginning. Thus the findings of fact in the *Iron Cap Copper Company Case*, No. 633, show:

> "In the early practice, before the Commissioner could prepare a schedule of credits[1] * * *, he had to have information from the Collector's office as to what taxes were due and how much the taxpayer had paid. Before the Commissioner issued a Schedule of Credits, the Commissioner had to know how much the taxpayer had overpaid on the year in question. An overpayment would not be allowed to be credited without evidence of the actual overpayment." (Rec., 38.)

Not only, therefore, was a credit not allowed when the Commissioner signed and forwarded to the Collector the Schedule of Overassessments, but it was impossible for the Commissioner to have made the allowance at that time. To hold that he did would put him in the position of allowing a credit—of *adjudicating* that the United States is indebted to the taxpayer (*United States* v. *Kaufman*, 96 U. S. 567, 570-571, 24 L. ed. 792, 793)—not only when he did not know how much to allow but when in many cases the Collector's report would show that the United States owed the taxpayer nothing.

The distinction between the determination of an overassessment and the allowance of a credit or refund was the foundation of the decision in the *Girard Trust Company Case*.

It was also the basis of the decision of the Court of Claims in the present case:

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[1]Regulations 45, Article 1035, provided "that a schedule of credit claims on Form 7220A will be transmitted to the Collector once a month and formal credit shall be taken by the Collector at that time."

> "The commissioner's decision that there has been an overassessment is one thing; the determination that there has been an overpayment is quite another. This cannot be determined by the commissioner until he is informed by the collector what part, if any, of the overassessment had been paid, and what part, if any, had been abated." (Rec., 20-21.)

That the determination of an overassessment, or even an overpayment (which is a step farther along), does not carry with it the allowance of a credit or refund, but that the latter is a separate and distinct act, has likewise been decided by the Board of Tax Appeals. The statute gives the Board jurisdiction in certain cases to determine whether a taxpayer has made an overpayment, and the question arose whether that carried with it jurisdiction to allow a credit or refund in those cases. The Board held not, saying:

> "*It would seem unnecessary to point out the distinction between a determination that the taxpayer has made an overpayment of tax and a determination that the taxpayer is entitled to a credit or to a refund.* The statute grants the Board jurisdiction to determine that the taxpayer has made an overpayment of tax in respect of the taxable year for which the Commissioner determined the deficiency, and then, so far as jurisdiction of the Board is concerned, becomes silent. The remainder of the provision is administrative, directing as it does that such overpayment shall be credited or refunded under certain circumstances. It gives the Board no jurisdiction to determine whether such circumstances exist." (Appeal of *Dickerman & Englis, Inc.*, 5 B. T. A. 633, 635.) [Italics ours.]

The Government relies especially upon the clauses in the Schedule of Overassessments directing the Collector to ascertain whether any part of the overassessment was an overpayment, and if so, to apply the overpayment as a credit on any taxes due for other periods and enter the balance as refundable, pointing to this as a "positive order to make the credit and reduce the tax liability." (Br., 21-22.)[1]

This would be delegating to the *Collector* authority to allow a credit, which, as the Government itself rightfully says (Br., 20), cannot be done.[2]

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[1]The statement in the Government's brief (pp. 8, 22) that, "To hold that this authorization by the Commissioner does not constitute an allowance of a credit is to hold that a taxpayer's tax liability may be discharged, without the credit having been allowed by any authority," is a plain *non sequitur*. The liability cannot be discharged until the tax is paid, and in the case of payment by giving credit for a prior overpayment, the payment is not consummated, and therefore the liability is not discharged, until the credit is allowed in the manner provided by law.

[2]Authority to allow credits or refunds of illegally collected taxes is judicial in its nature. (*United States* v. *Kaufman*, 96 U. S. 567, 570, 24 L. ed. 792, 793; *United States* v. *Real Estate Savings Bank*, 104 U. S. 728, 734, 26 L. ed. 908, 909; *United States* v. *Louisville*, 169 U. S. 249, 253, 42 L. ed. 735, 737.) Authority of that kind cannot be delegated by the officer in whom the statute has vested it. (*Martin* v. *Mott*, 12 Wh. 19, 31-32, 6 L. ed. 537, 541; *The Floyd Acceptances*, 7 Wall. 666, 676-677, 19 L. ed. 169, 173-174; *Runkle* v. *United States*, 122 U. S. 543, 557, 30 L. ed. 1167, 1171; *In re Giles*, 21 Fed., 2d, 536, 537; *Birdsall* v. *Clark*, 73 N. Y. 73, 29 Amer. Rep. 105, 106; *Lewis* v. *Lewis*, 9 Mo. 183,

Be that as it may, these directions were considered in the *Girard Trust Company Case*. If effective as an allowance of a claim for credit they would be equally effective as an allowance of a claim for refund. This Court, however, as we have seen, treated the entries made by the Collector pursuant thereto not as entries of credits or refunds which had been finally allowed, but as provisional or interlocutory entries—as findings of "the amount which *should* be credited on taxes due and the amount *to be* refunded," requiring the approval of the Commissioner to make them effective. (*Ante*, 9.)

In *Stotesbury* v. *United States*, 146 U. S. 196, 36 L. ed. 940, the Commissioner of Internal Revenue had signed a schedule of claims for the refunding of erroneously collected taxes at the bottom of a certificate reading:

> "I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined *and allowed*, and are transmitted to the Secretary of the Treasury for his consideration and advisement." (146 U. S. 196, 36 L. ed. 941.) [Italics ours.]

And the question was whether this constituted a final allowance of the claims.

Conceding that "the power of final decision is vested in the Commissioner, and that there is no appeal from

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43 Amer. Decs. 540, 543-544; *Mechem on Public Officers*, §§ 567, 568.) Indeed, even where the act is ministerial or executive in its nature, if, as here, the law expressly requires it to be done by a particular officer it cannot be delegated to another. (35 Op. A. G. 15, 21; *Mechem on Public Officers*, § 568.)

him to the Secretary of the Treasury," and that the only effect of transmitting the schedule to the latter was to afford him an opportunity to give advice if he desired (146 U. S. 200, 36 L. ed. 942), the Court nevertheless held that the sending of the schedule to the Secretary even for this limited purpose indicated that the Commissioner had made no final decision though the certificate signed by him stated that the claims *have been allowed*.

Even less could the signing by the Commissioner of the Schedule of Overassessments have been a final allowance of the claim for credit in the present case, because not only was the schedule transmitted to another officer for a report, but until that report was received the Commissioner did not know what amount to allow as a credit, or whether the taxpayer was entitled to any credit at all for that matter.

b. The Commissioner had no authority to allow a credit at the time he signed the Schedule of Overassessments.

Prior to the passage of the Revenue Act of 1918 the authority now vested in the Commissioner to allow an overpayment of taxes for one year to be credited on taxes due and unpaid for another year did not exist. (A. R. M. 123, Cum. Bul. No. 4 pp. 330-332; L. O. 1106, Cum. Bul 1-2, p. 221; S. M. 4170, Cum. Bul. IV-2, pp. 102, 103.)

Section 252 of that Act granted such authority in the following terms:

> "That if, upon examination of any return of income * * * *it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due,*

> then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installments thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer * * *." [Italics ours.]

This provision was reenacted verbatim in the Revenue Act of 1921, §252, and without material change in the Revenue Act of 1924, §281, the Revenue Act of 1926, §284, and the Revenue Act of 1928, §322. There is no other law on the subject. (L. O. 1106, Cum. Bul. 1-2, p. 221.)

Thus, no authority has ever existed under the law to allow a credit *until* "it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due," or in the language of the later acts, *until* it appears that "there has been an overpayment of any income, war-profits or excess-profits tax."

"When a statute limits a thing to be done in a particular mode it includes the negative of any other mode." (*Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289, 73 L. ed. 379, 385. See also *Farrell* v. *United States*, 99 U. S. 221, 224, 25 L. ed. 321, 322.)

This limitation upon the authority to allow a credit was early recognized by the Bureau of Internal Revenue itself. Opinion 957 of the Solicitor of Internal Revenue held:

> "* * * It [Revenue Act of 1918, §252] provides only for the allowance of the credit when 'it *appears* that an amount of income, war profits, or excess profits tax has been paid in excess

> of that properly due.' * * * It is only the amount of the excess which can be credited against assessments upon another return and the amount of the excess can only be known when the merits of the claim for refund have been determined. It is clear then that the word 'appears' as used in this section is equivalent to '*has been ascertained.*'" (Cum. Bul. No. 1, pp. 256, 257.) [Italics ours.]

Now, at the time the Commissioner, in whom alone authority to allow credits is vested, first decided that there had been an overassessment and signed and forwarded to the Collector a schedule thereof, it had not *appeared* that the amount of tax paid was in excess of that properly due. As already seen (*ante*, 18-20), the Commissioner's decision that there had been an over*assessment* was not a decision that there had been an over*payment*. That depended upon what part, if any, of the tax assessed had been paid, and what part, if any, had been abated. In other words, it depended upon the state of the taxpayer's account, and that account was kept by the Collector. (*Girard Trust Company Case*, 270 U. S. 171, 70 L. ed. 529.)

It follows that until the Schedule of Overassessments was returned to the Commissioner with the Collector's report showing whether there had been an overpayment, and if so, the amount of it, the Commissioner *had no authority* under the law to allow a credit.

c. A credit can not be allowed until the amount is fixed finally by the Commissioner, and that had not been done at the time the Schedule of Overassessments was signed.

As already shown, there can be no allowance by the Commissioner of Internal Revenue of either a credit

or a refund until the amount has been fixed finally by him. (*Ante*, 10-12.)

At the time the Commissioner signed the Schedule of Overassessments he not only had not fixed the amount of the credit but did not even know whether there would be any credit. (*Ante*, 18-19.)

3. THE CONTENTION THAT THE COMMISSIONER'S APPROVAL OF THE SCHEDULE OF REFUNDS AND CREDITS RELATED ONLY TO REFUNDS.

It is contended that the signing by the Commissioner of the Schedule of Refunds and Credits could not constitute an allowance of a credit because what appeared immediately above his signature contained no reference to credits but was merely a direction to the Disbursing Clerk of the Treasury to pay the refunds found due. (Govt. Br., 23.)

This takes too literal a view of the matter. The schedule, as its title indicates, is a statement of credits, as well as of refunds, found by the Collector to be due the taxpayers named therein. Moreover, what the Commissioner subscribed was a direction to the Disbursing Clerk to pay not only the refunds found due, but interest on the credits found due, and his signature at that place, by necessary implication, if not expressly, constituted his approval of the findings of his subordinates as therein set forth with respect to overpayments made by the taxpayers named, and the amounts that should be credited and refunded, respectively. In short it was the act which made the schedule effective as an award or allowance.

This Court so construed the action of the Commissioner in the *Girard Trust Company Case*. Thus, referring to the Collector's report to the Commissioner of "the amount which should be credited on taxes due and the amount to be refunded," the opinion states, "that this is examined by the Assistant Commissioner and then is delivered to the Commissioner, who makes it effective by his approval." (270 U. S. 171, 70 L. ed. 529.)

Besides, as stated in the same opinion—

> "Allowance in its ordinary sense does not mean payment, and in the practical administration of the Treasury Department the two things are quite different. The one is a decision by the competent authority that the payment should be made. The other is the actual payment." (270 U. S. 169, 70 L. ed. 528.)

If, then, as the Government's brief states (p. 23), the signing by the Commissioner of the Schedule of Refunds and Credits "was no more than an authorization to the Disbursing Clerk to pay to the taxpayers entitled thereto the refunds and interest due," it would no more constitute an allowance of a refund than of a credit.

This argument, therefore, if valid at all, could be made with equal force as regards the allowance of *refunds*, and *was* made in the *Girard Trust Company Case*, 270 U. S. 163, 70 L. ed. 524, and in the *Birkenstock Case*, 271 U. S. 348, 70 L. ed. 983, but was overruled.

Let it be supposed, however, that the signing by the Commissioner of the Schedule of Refunds and Credits

constituted an allowance of refunds only. Allowance of credits would then have to be sought in some other act of the Commissioner subsequent to the receipt of the Collector's report.

It would have to be sought in some other act of the *Commissioner*, because he "is the final judge in the administrative branch of the Government to decide * * * that a refund or credit should be granted." (*Girard Trust Company Case, ante,* 7-8.) And the act must be *subsequent* to the Collector's report, because until then, as elsewhere shown, the Commissioner had neither the necessary information nor the authority to allow a credit. (*Ante,* 23-25.)

One such act is the mailing by direction of the Commissioner to each taxpayer listed in the Schedule of Refunds and Credits of a Certificate of Overassessment showing the amount of the overassessment abated, credited, or refunded. In the present case that was done September 26, 1923. (Special Findings of Fact, XII, Rec., 16.)

The brief for the Government states that after the Commissioner signs the Schedule of Overassessments "he never thereafter, either in a certificate of any kind or in a communication to the Collector, directs an allowance of a credit or refers to the allowance of a credit," and that the Court below disregarded this fact. (P. 22.)

There is no occasion for the Commissioner to communicate to the Collector any directions to allow a credit. The Commissioner must allow the credit himself. (*Ante,* 7-8, 21.)

The further statement that after signing the Schedule of Overassessments the Commissioner never there-

after notified the Collector of the allowance of a credit is erroneous. *After* both that schedule and the Schedule of Refunds and Credits had been signed by him Certificates of Overassessment addressed to the respective taxpayers, and upon which now for the first time appeared the amounts allowed by the Commissioner by way of credit or refund, "were dated and returned to the Collector for mailing to the taxpayers." (Special findings of Fact XI, Rec., 14-15.)

Certainly, this was notice to the Collector, as it was to the taxpayer, that a credit or refund or both had been allowed.

4. THE CONTENTION THAT THE PRACTICE OF THE BUREAU OF INTERNAL REVENUE HAS BEEN TO TREAT A CREDIT AS ALLOWED WHEN THE COMMISSIONER SIGNS THE SCHEDULE OF OVERASSESSMENTS.

The Government's brief states:

> "The Bureau of Internal Revenue has consistenly taken the position that a credit is allowed when the Commissioner of Internal Revenue signs the schedule of overassessments except during the period when Treasury Decision 3850, Cumulative Bulletin V-1, p. 354, was in effect." (Pp. 25-26.)

The same alleged practice was invoked without success in the *Girard Trust Company Case* as determinative of the date of allowance of refunds and credits alike. (*Ante*, 8.)

A practice of the Bureau of Internal Revenue, even when consistent and long-continued, cannot determine what constitutes an allowance of a claim for credit any more than a claim for refund. (Compare *United States* v. *Dickson*, 15 Pet. 141, 161-162, 10 L. ed. 689,

697, cited in *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, 280, 73 L. ed. 322, 378.) The law determines that. And the law as declared by this Court requires that the amount be fixed finally by the Commissioner before a claim for credit or refund can be deemed allowed. (*Ante*, 10.) It follows that no practice of the Bureau of Internal Revenue could make the allowance of a credit any more than the allowance of a refund take place when the Commissioner signs the Schedule of Overassessments, because at that time the Commissioner, so far from having fixed the amount of the credit or refund, does not even know that there will be one. (*Ante*, 18-19.)

As a matter of fact the position of the Bureau of Internal Revenue with respect to this matter was anything but consistent.

On the one hand Article 1040 of Regulations 62 of 1922 relating to the computation of interest provided:

> "A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for credit or refund."[1]

But turning to the schedule referred to in this article of the regulations—the Schedule of Overassessments—it will be seen that it did not even purport to be an allowance by the Commissioner of a credit or refund. It was merely an allowance of a "reduction of tax liability"—a determination of an overassessment—

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[1] This is the provision of the regulations that this Court rejected in the *Girard Trust Company Case.* (*Ante*, 8.)

which is but the first step in the allowance of a credit or refund. (*Ante*, 17-18.)

Again, under the early practice, as found in the *Iron Cap Copper Company Case*, "before the Commissioner could prepare a Schedule of Credits * * *, he had to have information from the Collector's office as to what taxes were due and how much the taxpayer had paid." (No. 633, Rec., 38.) This is entirely inconsistent with the position that a claim for credit is allowed when the Schedule of Overassessments is signed because at that time the Commissioner had no information as to taxes paid or taxes owing by the claimant.

Again, Treasury Decision 3260 stated:

> "Upon receipt of such schedules [Schedules of Overassessments] the several collectors of internal revenue shall immediately check the items thereon against the accounts of the several taxpayers concerned and determine whether the several amounts of overassessments *should* be abated, refunded or credited against assessments remaining unpaid." (Cum. Bul. No. 5, p. 243.) [Italics ours.]

This also is inconsistent with the position that the Commissioner allowed a credit when he signed the Schedule of Overassessments.

Again, in the Schedule of Refunds and Credits on which the Collector made his report to the Commissioner after receiving the Schedule of Overassessments and examining the taxpayer's account, the amounts set forth as due the taxpayer by way of credit or refund were described in the certificate of the collector as items that "*appeared* for refund or credit," and as items "*subject* to refund or credit."

Again, the Certificate of Overassessment, which was not dated nor forwarded to the taxpayer until after the Schedule of Overassessments had been signed by the Commissioner and transmitted to the Collector and returned, states:

> "The amount of the overassessment *will* be applied as follows: * * * if the tax has been paid, the amount of the overpayment *will* either be credited * * *, etc., etc."

So far, therefore, from being consistent on this point, the practice of the Treasury Department tended more strongly against than for the view that a credit was allowed when the Commissioner signed the Schedule of Overassessments, so much so, indeed, that the understanding of Congress was that the signing of the Schedule of Overassessments was only the first step. Thus the report of the Senate Committee on Finance on the Revenue Act of 1926, describing the practice, states:

> "In practice, the Commissioner *first* signs a Schedule of Overassessments, which is sent to the Collector, *in order to determine whether the overpayment should be credited or refunded.*" (Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 38.) [Italics ours.]

5. THE CONTENTION BASED ON ALLEGED DIFFERENCES IN DEPARTMENTAL PROCEDURE WITH REGARD TO CREDITS AND REFUNDS, RESPECTIVELY.

The Government's brief states that "the difference in procedure followed by the Treasury Department in the allowance of a refund and of a credit was not specifically brought to the attention of the Court" in the *Girard Trust Company Case*. (P. 7.)

There were no differences of any consequence. The entire procedure as regards both credits and refunds, leaving out unessential detail, was as follows: The first step was the Commissioner's decision that there had been an overassessment, which was forwarded to the Collector in the form of a Schedule of Reductions of Tax Liability or Schedule of Overassessments. The Collector then ascertained from his books whether any part of the overassessment was an *overpayment,* and if so how much should be held as a credit against unpaid assessments for other years and how much refunded. He then entered these amounts on the Schedule of Overassessments, and on a subsidiary schedule called the Schedule of Refunds and Credits, under the headings "Amount Credited" and "Net Amount Refundable," respectively, and returned both schedules to the Bureau of Internal Revenue. There the Collector's report was examined and if found correct the Commissioner signed the Schedule of Refunds and Credits. (Special Findings of Fact, XI, Rec., 15.)

The only real point of divergence is that the allowance of a credit requires an additional decision by the Commissioner after he has received the Collector's report, which is not required in the case of a refund only, namely, whether the unpaid assessments against which it is proposed to apply the overpayment as a credit are legally collectible. (Solicitor's Law Op. 1095, Cum. Bul. I-1, pp. 313, 314, 315.) That, however, makes it even clearer in respect of credits than in respect of refunds that there can be no allowance until the Collector has returned the schedules to the Commissioner with the entries showing the state of the taxpayer's account.

The Government's brief states further that prior to November 23, 1921, and after January 1927, the Schedule of Refunds and Credits was not in use, and that during those periods the Collector's report was not entered on any subsidiary schedule signed by the Commissioner, and that therefore if the rule is that a credit is only allowed when the Commissioner signs such a schedule, "credits totaling millions of dollars have been allowed without authority," and the suggestion is that the Government could be required to refund these millions. (Pp. 24-25.)

The short answer is that this is an essentially different procedure from that involved in the present cases. The present cases, like the *Girard Trust Company Case*, arose in the period when the amounts to be credited, as well as the amounts to be refunded, as ascertained and reported by the Collector, *were* entered on a subsidiary schedule which the Commissioner *did* sign. (Special Findings of Fact, XI, XII, Rec., 14-16.)

It will be time enough when the question arises, *and all the facts are presented*, to consider what would constitute allowance of a credit under the essentially different course of business alleged to have prevailed at other times.

Besides, even if it should turn out that "credits totaling millions of dollars" were collected without authority under the practice prevailing prior to November 23, 1921 and after January 1927, it would not follow that the Government would have to refund the money. Rather, the presumption is that with respect to the earlier years recovery would be barred by the statute of limitations, and that with respect to the

period after January 1927 there would still be time in most cases to collect whatever taxes are due.

The Government's brief also states that where no refunds and no credits on which interest must be paid were listed on a Schedule of Refunds and Credits the schedule was filed without being signed by the Commissioner.[1] (P. 24.)

Inasmuch as the statute has provided for interest on credits ever since the Schedule of Refunds and Credits came into use,[2] such a case would be very unusual, and as Mr. Justice Story said in *United States* v. *Dickson*, 15 Pet. 141, 164, 10 L. ed. 689, 698, "to put an extreme case is not a good test of the fair and just interpretation of any statute."

Here again, moreover, it will be time enough to decide what constitutes the allowance of a credit in such an exceptional case when it arises (if it ever does) and all the facts are presented.

It is sufficient now to say that it is the Commissioner's "approval" of the Collector's report which this Court held constituted allowance of a claim for credit or refund in the *Girard Trust Company Case*, and such approval might be indicated in other ways than by signing the Schedule of Refunds and Credits. It

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[1]The statement is based on a finding in the *Iron Cap Copper Company Case*. No such finding was made in *the Boston Buick Company Case* nor in the present case.

[2]Interest on refunds and credits was first provided for in the Revenue Act of 1921. The Schedule of Refunds and Credits came into use in February 1923. (Special Findings of Fact, XIII, Rec., 16-17.)

might be indicated by the mailing of the Certificate of Overassessment notifying the taxpayer of the amount credited (*ante*, 28), or it might be implied from the course of business.

Similar contentions were answered by the Circuit Court of Appeals in the *Boston Buick Company* and *Iron Cap Copper Company Cases* as follows:

> "Even if large sums have been credited to taxpayers without the signature of the Commissioner on the Collector's report after it is returned to his office, it cannot change the law, though it does not follow from facts stated by counsel in argument that the Commissioner's assent to the report of the Collector may not in each case have been implied." (35 Fed., 2d, 563.)

In connection with the subject of administrative practice, the Government's brief mentions, without showing how it is material, that the Revenue Act of 1926, § 1116 (b) (2), provided that refunds should be regarded as allowed on the date when the certificate [schedule] of overassessment was signed (p. 26), as the Treasury had contended and contrary to the decision of this Court in the *Girard Trust Company Case*. This provision was repealed in the very next revenue act, Revenue Act of 1928, § 614 (c), and, of course, never was applicable to cases arising before its enactment. (See *Blair, Comr.*, v. *United States ex rel. Birkenstock*, 271 U. S. 349-350, 70 L. ed. 983-984.)

Point II.

Assuming as asserted by the Government that the credit was allowed February 9, 1923, when the Commissioner signed the Schedule of Overassessments for transmission to the Collector, it did not take effect as a payment of 1917 taxes so as to start the running of the period of limitations for filing claims for refund until notice of the allowance was received by the taxpayer, which was not earlier than September 26, 1923, the date of the Certificate of Overassessment.

Treasury Regulations 62, Art. 1035, under the Revenue Act of 1921, which were in force when the claim for credit in this case was allowed, expressly provided that "due notice will be given * * * the taxpayer of the action taken on the claim."

The taxpayer's first and only notice that a credit has been allowed is the Certificate of Overassessment[1] (Special Findings of Fact, XI, Rec., 16), and that is not sent to him until after the Commissioner has received from the Collector and approved the Schedule of Refunds and Credits. (*Ibid.*) Until then the whole matter remains locked in the breast of the Commissioner. "The schedule of assessments which the Commissioner approves is not a record open to the public, but is an interdepartmental document, and the tax-

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[1]Regulations 69, Article 1302, provided: "Overassessments and overpayments of income and profits taxes will be adjusted by means of certificates of overassessment." See also Regulations 65, Article 1302, (2), and Regulations 62, Article 1031 (a), (b).

payer apparently has no authoritative information as to the decision of the Commissioner except the prescribed notice by mail." (*Michel* v. *United States*, Jan. 6, 1930, — Fed., 2d, —, C. C. A. 2d.)

Nor is there any limit to the time which may intervene between the signing of the Commissioner's authorization to the Collector on the Schedule of Overassessments, and the signing of the Schedule of Refunds and Credits, or between the signing of the latter and the mailing of the Certificate of Overassessment. All that is entirely within the control of the Commissioner. In the present case seven months elapsed between the signing of the Schedule of Overassessments and the signing of the Schedule of Refunds and Credits, and nearly a month more before the taxpayer was notified of the Commissioner's action by receipt of the Certificate of Overassessment on or about September 26, 1923.

Therefore, where payment of a tax is effected by crediting against it an overpayment for another year, unless the *date of notice* of the credit, rather than the date of allowance, be taken as the date of payment of the tax for the purposes of the statute of limitations, the time limited by law for filing a claim for refund or bringing suit to recover an illegally collected tax would be running against the taxpayer without his having any means of knowing it. In other words, by delaying notice to the taxpayer the Commissioner could cut down at will the statutory period of limitations. "It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute." (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, 73 L. ed. 410, 415.)

Compare *Michel* v. *United States, ante,* where the Circuit Court of Appeals, 2nd Circuit, held that the period prescribed by Revised Statutes §3226, as amended, within which to bring suit on a claim for refund, namely, two years from the disallowance of the claim, does not commence to run until the taxpayer has received notice of the disallowance as provided for by the statute. A like decision was made by the District Court, Northern Ohio, in *Mahoning Coal R. Co.* v. *United States*, 28 Fed. (2d) 917.

Point III.

Regardless of whether the claim for refund filed September 3, 1927, was in time, the original claim filed February 28, 1923, admittedly within the prescribed period,[1] was sufficient to satisfy the statutory condition precedent to bringing suit for the recovery of the illegally collected tax, but granting that it was not, it clearly indicated the general nature of the claim, and therefore could be perfected by amendment as well after the expiration of the period of limitations as before, and was perfected by the claim filed September 3, 1927.

1. Revised Statutes, § 3226, as amended, provides that no suit shall be maintained for the recovery of erroneously or illegally collected internal-revenue taxes

> "until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in

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[1]Special Findings of Fact, VII, Rec., 13.

> that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof."

The "provisions of law in that regard," so far as applicable in the present case, are § 252 of the Revenue Act of 1921 and § 284 (b) (1) of the Revenue Act of 1926, neither of which lays down any requirements as to the form or contents of such claims. Both provide merely that no refund or credit shall be allowed after a specified time (five years from the date when the return was due, or four years from the date the tax was paid),

> "unless before the expiration of such period a claim therefor is filed by the taxpayer."

While the Treasury regulations under the Revenue Acts provide that "all the facts relied upon in support of the claim should be clearly set forth under oath" to be workable this must be construed as referring not to evidential facts but to the *ultimate facts* only—such facts, at most, as would have to be stated in the initial pleading in an action in the courts; and even in that restricted sense failure to observe the regulations, as this Court has said, "does not necessarily preclude recovery." (*Tucker* v. *Alexander*, 275 U. S. 228, 231, 72 L. ed. 253, 256.)

The original claim stated a number of grounds, making brevity of statement desirable. The particular ground involved here, reading, "Foreign Dividends Overstated" (Pet., Ex. A, Rec., 8-9), while abbreviated like the rest, could mean only one thing—that amounts had been included in the taxpayer's return of income for 1917 as dividends received from a foreign com-

pany or companies which should not have been included because not a part of the taxpayer's income for that year.

This was a sufficient statement of claim to meet the condition of the statute that no refund or credit shall be allowed after five years from the date when the return was due, or four years from the time the tax was paid, as the case might be, "unless before the expiration of such period a claim therefor is filed by the taxpayer." Revenue Act of 1921, § 252; Revenue Act of 1926, § 284 (b) (1).

We do not mean to suggest, of course, that this statement of claim included all the facts necessary to a decision. But all other facts, i. e., the details of the case, could be supplied and were supplied in supplemental statements in the nature of bills of particulars, as in actions at law.

2. But granting that the original claim was not sufficient of itself, it could be perfected by amendment as well after the expiration of the period of limitations as before. In other words, it was sufficient to stop the running of the statute of limitations.

The Bureau of Internal Revenue itself holds that a claim for refund which falls short of meeting the requirements of the regulations may still be sufficient to stop the running of the statute of limitations. Thus:

> "Even in the case of refund claims, where regulations in reference thereto are required by the statute, the Bureau, following the opinion of the Attorney General (14 Op. A. G. 615), has *consistently* held that an informal claim is sufficient to stop the running of the statute of lim-

itations." (G. C. M. 499, Cum. Bul. V-2, 171, 173.) [Italics ours.]

Of course, a claim for refund may be so vague and intangible as to be of no effect for any purpose, and therefore incapable of arresting the statute of limitations; as, for example, a claim "for amounts paid by it [the taxpayer] in taxes which, through lack of information as to requirements of law, or by error in computation, it may have paid in excess of the amount legally due" (see *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 354, 64 L. ed. 297, 304), or a claim which "merely asserted that the statute was unconstitutional and that the regulations were not in accordance with the statute" (see G. C. M. 1020, Cum. Bul. VI-1, 119, 121).

But, under the Treasury's own practice, it is enough to support an amendment after the statute of limitations has run if the taxpayer's statement of claim sets forth "the *general nature* of his claim or information that would indicate a possible error in the computation of the tax liability for the taxable year for which the overpayment was made." (G. C. M. 4355, Cum. Bul. VII-2, 175. [Italics ours.]

In *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I Co.*, 269 U. S. 217, 226-227, 70 L. ed. 242, 247, this Court held that a complaint against a carrier before the Interstate Commerce Commission praying reparation on account of unreasonable rates, which did not set forth the points of origin and destination, or the dates of the shipments, or the quantities shipped, or the charges paid, or any other particulars of the claim, could be perfected by amendment after the statute of limitations had run.

This rule is subject, of course, to the qualification that the amendment must be limited to developing or correcting the statement of the claim or cause of action as originally made. No new cause of action may be brought in at that stage.

Applying the rule to the present case, the original claim for refund included a number of different grounds, as we have seen. The particular ground of claim in controversy, reading "Foreign Dividends Overstated," could only mean, as before stated, *that amounts had been included in the taxpayer's return of income for* 1917 *as dividends received from a foreign company or companies which should not have been included because not a part of the taxable income for that year.* This, certainly, was sufficient to indicate the general nature of the claim.

The amended claim, in alleging the name of the company paying the dividend, the amount thereof, and the reason why it was not income of the taxpayer for 1917, namely, because it was a stock dividend, supplied the particulars of the claim.

True, the reason alleged in the amended claim for excluding the dividend from Swift and Company's taxable income for 1917 was new, but there is a fundamental distinction between an amendment which merely alleges a new theory or contention in support of the *same* claim or right of action and an amendment which sets up a *different* claim or right of action. (*Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316, 321, 71 L. ed. 1069, 1072; *Friederichsen* v. *Renard*, 247 U. S. 207, 210, 62 L. ed. 1075, 1083; *United States* v. *California & O. Land Co.*, 192 U. S. 355, 48 L. ed. 476;

1 Corp. Jur. 1056-1057; *Clark on Code Pleading*, 1928, p. 513.)

Here, only *one* claim or right of action was asserted—*the right to recover an overpayment of income and war excess profits taxes for 1917 caused by including as a part of the taxpayer's income for that year a dividend which was not such.*

This Court has said that the statute and regulations relating to claims for refund were devised, "not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial." (*Tucker v. Alexander*, 275 U. S. 228, 231, 72 L. ed. 253, 256.) The original claim in this case, as amended, completely fulfills this purpose.

Conclusion.

The petition should be denied because the question sought to be reviewed has already been decided by this Court, and because in any event the decision of the Court of Claims is clearly right, and there is no conflict of decisions, but accord.

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March 7, 1930.